STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1692

Michael Anthony Guardia,
Respondent,

vs.

Jennifer Marie Mattson,
Appellant.

Filed June 15, 2020
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-FA-18-1882

Maury D. Beaulier, St. Louis Park, Minnesota (for respondent)

Michael D. Dittberner, Linder, Dittberner & Winter, Ltd., Edina, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant mother challenges the district court's order increasing respondent father's parenting time. We affirm.

FACTS

Appellant-mother Jennifer Marie Mattson and respondent-father Michael Anthony Guardia are the parents of M.A.G., born in 2012, and M.T.G., born in 2013. Mother and father married in January 2012. In December 2016, a Texas district court dissolved their marriage in a judgment and decree that appointed mother and father as "Joint Managing Conservators" of the children, designated mother as the "primary managing conservator" and father as a "non-custodial parent," and allowed mother to determine the location of the children's primary residence.

The judgment and decree awarded father parenting time during the school year from Friday afternoon through Monday morning following the second, fourth, and fifth Friday of every month, as well as overnight on Thursdays if he lived within 100 miles of the children's primary residence. The judgment and decree awarded father parenting time during the summer from Friday night through Sunday night following the second, fourth, and fifth Friday of every month, as well as 30 days of parenting time if he lived within 100 miles of the children's primary residence. The judgment and decree generally allowed father to exercise his extended summer parenting time consecutively. At the time of the dissolution, mother resided in Minnesota and father resided in Texas. Father moved to Minnesota in June 2017.

In December 2018, father moved the Minnesota district court for an order modifying custody and granting him additional parenting time. Father asked the district court to order a 5-2-2-5 parenting-time schedule during the school year such that mother would have parenting time every Monday and Tuesday, father would have parenting time every

Wednesday and Thursday, and mother and father would generally alternate weekends. In January 2019, the district court ordered a parenting-time evaluation. In February 2019, the district court formally accepted jurisdiction over the matter, denied father's motion to modify custody, and again directed the parties to participate in the parenting-time evaluation. In April 2019, the parenting-time evaluator recommended that the district court adopt a 5-2-2-5 parenting-time schedule for the entire year and allow each parent two nonconsecutive weeks of vacation until M.T.G. turned eight, at which point the weeks of vacation could be consecutive.

In June 2019, father moved the district court to adopt the parenting-time evaluator's recommendations or to modify physical custody. In July 2019, mother moved the district court to deny father's motion and to modify father's extended summer parenting time such that he could exercise it consecutively for no more than 15 days at a time.

Following a hearing, the district court granted father's motion to adopt the 5-2-2-5 parenting-time schedule recommended by the parenting-time evaluator, "[c]ommencing immediately," and adopted the parenting-time evaluator's recommendation regarding father's extended summer parenting time. The district court did so based on its application of the best-interests standard. Mother asked the district court to stay implementation of the 5-2-2-5 schedule. There is no indication that the district court granted that request. Mother appeals.

D E C I S I O N

"The district court has broad discretion in determining parenting-time issues and will not be reversed absent an abuse of that discretion." *Dahl v. Dahl*, 765 N.W.2d 118,

123 (Minn. App. 2009). The district court abuses its discretion when it misapplies the law or makes findings of fact that are unsupported by the record. *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010).

I.

Custody modifications are governed by Minn. Stat. § 518.18(d) (2018), which provides that a district court may not modify an existing custody order unless "a change has occurred in the circumstances of the child or the parties and . . . the modification is necessary to serve the best interests of the child." One such circumstance exists if a "child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." Minn. Stat. § 518.18(d)(iv).

Modification of a parenting-time schedule is generally governed by Minn. Stat. § 518.175, subd. 5(b) (2018), which provides that "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence." But if a requested parenting-time modification would result in a de facto custody modification, the district court must apply the standard for custody modification when ruling on the request. *In re Custody of M.J.H.*, 913 N.W.2d 437, 438, 441 (Minn. 2018). The question of which legal standard applies to a motion to modify parenting time is a question of law that this court reviews de novo. *Id.* at 440.

In *M.J.H.*, the Minnesota Supreme Court explained how a court is to determine whether a motion to modify parenting time is a de facto motion to modify physical custody, such that the endangerment standard applies. *Id*. at 441-43. The supreme court emphasized that "a motion for equal parenting time should not be treated as a motion for joint physical custody entirely on the basis that the sole physical custodian would no longer have the majority of the parenting time." *Id.* at 442. The court explained that

> when determining whether a motion to modify parenting time is a de facto motion to modify physical custody for purposes of deciding whether the endangerment standard applies, a court should consider the totality of the circumstances to determine whether the proposed modification is a substantial change that would modify the parties' custody arrangement. The factors considered may include the apportionment of parenting time, the child's age, the child's school schedule, and the distance between the parties' homes, but these factors are not exhaustive.

Id. at 443.

In *M.J.H.*, the supreme court considered whether a father's proposed modification. would have modified physical custody, that is, whether it would have "effectively modif[ied] [the mother's] 'routine daily care and control' of the child." *Id.* at 441-42 (quoting Minn. Stat. § 518.003, subd. 3(c) (2016) (defining physical custody)). The supreme court determined that the father's proposed modification would have done so, reasoning as follows:

> [Father's] request would affect half of all school days by increasing his parenting time from every other weekend, Friday through Monday morning, to every other week, Sunday through Sunday. [Father's] proposed modification . . . would change [mother's] daily care and control of the child from nearly every school day to half of all school days. And the

> modification would result in the child spending approximately 2 hours each weekday traveling between [father's] home and the child's school, which would necessarily affect daily routines and scheduling matters. Considering the child's age, school schedule, and the distance between the two parties' homes, we conclude that [father's] proposed modification is substantial enough to change [mother's] routine daily care and control of the child.

Id. at 442 (quotation omitted). Because the father's motion "modifie[d] the parties' sole physical custody arrangement," the supreme court concluded that "the endangerment standard in Minn. Stat. § 518.18(d)(iv) applie[d] to his motion." *Id.*

In this case, the district court determined that father's requested parenting-time modification would not constitute a de facto change in custody. Mother assigns error to that determination, contending that the "district court's order modifying parenting time was a de facto modification of physical custody requiring application of the endangerment standard." She argues that "the 5-2-2-5 schedule constitutes a de facto modification of physical custody given the apportionment of parenting time, the children's ages, and the length of the commute between [father's] home and the children's school."

As to the apportionment of parenting time and the children's school schedule, the district court estimated that under the existing parenting-time schedule father had parenting time "approximately 136 overnights annually" and that under the proposed 5-2-2-5 parenting-time schedule father would have parenting time "approximately 182 overnights annually." The district court found that "[b]oth parents are involved in the children's school and activities" and reasoned that "[a]lthough granting Father's request will require

adjustments to the children's schedules, doing so will not significantly alter the parties' involvement in the children's lives."

Mother does not dispute that father had approximately 136 annual overnights of parenting time under the Texas judgment and decree. Instead, she argues that it is misleading to analyze father's parenting time using the entire calendar year, which includes father's extended summer parenting time. Mother notes that the "change to equal parenting time during the school year results in a 67% increase in school overnights (from 3 to 5 overnights) during a two-week period," and argues that this change in school overnights is significant.

But the increase in school overnights that mother highlights amounts to one additional weekday of parenting time each week. Under the 5-2-2-5 schedule, father has parenting time on every Wednesday and Thursday, rather than just every Thursday. Father already had parenting time from Friday afternoon through Monday morning on alternating weekends, and the district court found that he was already involved in the children's school and activities. Under the circumstances presented by this record, we are not persuaded that one additional weekday of parenting time each week during the school year is a substantial change that will have a significant impact on mother's routine daily care and control of the children. Such a change is far less disruptive than the shift to alternating weeks of parenting time that the supreme court considered a de facto modification of custody in *M.J.H.* *See id.* at 439, 442.

As to the children's ages, the district court noted that "[M.A.G.] is now seven years old and [M.T.G.] is almost six years old" and that, "[g]iven their ages, the children are

starting school and developing their patterns with each parent." Mother argues that the district court "discounted the children's ages as a factor in its determin[ation] whether a de facto modification of physical custody was present," but "raised concern about the children's ages in another portion of the findings by pointing to the children's relative youth as necessitating that the children did not spend more than one week away from one parent" during the summer. Mother argues that "[i]f the children's ages were that critical, it would seem that their youth should have weighed in favor of viewing [father's] motion as seeking a de facto modification of physical custody."

Mother's suggestion that the district court's approach is inconsistent and therefore erroneous is unavailing. The parenting-time evaluator indicated that, because of the children's young ages, they had only a limited understanding of their parents' weekly parenting-time schedule. But the parenting-time evaluator expressed the separate concern that, for such young children, an "extended absence from a parent can cause anxiety, depressive thoughts, and confusion in the child." Thus, the record supports a conclusion that although the children's ages weighed against extended parenting time for father in the summer, their ages did not weigh against an increase of father's parenting time during the school year.

As to the distance between the parties' homes, the district court found that the children's school is "relatively equidistant from each [parent's] residence" and reasoned that "[i]ncreasing Father's parenting time to 50% will not require the children to spend excessive time commuting between the locations." Mother argues that the district court erred by finding that the children's school is "relatively equidistant" from each party's

home because her home is significantly closer to the children's school. Even if mother is correct, the actual change in commute time resulting from the 5-2-2-5 schedule is relatively minor, resulting in one additional round-trip commute for the children each week.

The change in commute time associated with the 5-2-2-5 parenting-time schedule here is far less significant than the one associated with the requested parenting-time modification in *M.J.H.* The change in *M.J.H.* would have "result[ed] in the child spending approximately 2 hours each weekday traveling between [the father's] home and the child's school" on alternating weeks when the father had parenting time, "which would necessarily affect daily routines and scheduling matters." *See id.* at 442. When viewed in context, the distance between the parties' homes in this case does not, without more, indicate a de facto change in custody. Therefore, any error in the district court's finding that the parties' homes are equidistant from the school can be ignored as harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Considering the totality of the circumstances, including the apportionment of parenting time, the children's school schedules, the children's ages, and the distance between the parties' homes, the district court did not err by concluding that father's proposed modification was not a substantial change that would modify the parties' custody arrangement. Because father's motion to modify parenting time was not a de facto motion to modify physical custody, the district court did not err by declining to apply the endangerment standard.

II.

If a requested parenting-time modification "would not change the child's primary residence," the district court applies the best-interests standard when deciding whether to make that modification. Minn. Stat. § 518.175, subd. 5(b). Although the legislature has not defined "primary residence," *M.J.H.*, 913 N.W.2d at 440; *see* Minn. Stat. § 518.003 (2018), we have defined it as "the principal dwelling or place where [a] child lives," *Suleski v. Rupe*, 855 N.W.2d 330, 335 (Minn. App. 2014).

In *M.J.H.*, this court held that in determining whether a proposed modification of parenting time would constitute a change in a child's primary residence, "the district court should consider not only the apportionment of parenting time under the proposed modification, but also the child's other relevant attachments to each parent's place of residence and the impact of the modification on those attachments." 899 N.W.2d 573, 574 (Minn. App. 2017), *rev'd on other grounds*, 913 N.W.2d 437 (Minn. 2018). These attachments "could include where the child attends school, participates in extracurricular activities, socializes with peers, or worships." *Id.* at 578.

The district court determined that father's requested parenting-time modification would not change the children's primary residence. Mother challenges that determination, contending that the "district court's order modifying parenting time was a modification of the children's primary residence requiring application of the endangerment standard." Mother argues that the supreme court's statement in *M.J.H.* "that 'physical custody' and 'primary residence' are distinct concepts indicates that the supreme court may view the 'totality of the circumstances' type of balancing test as being inapplicable to a

determination of whether a parenting time modification involves modification of a primary residence." She asks this court to focus instead on "the apportionment of school overnights."

In *M.J.H.*, the supreme court stated "that the terms 'parenting time,' 'physical custody,' and a 'child's primary residence,' are distinct yet overlapping concepts as defined by the Legislature." 913 N.W.2d at 440. But because the supreme court concluded that the requested parenting-time modification in *M.J.H.* would have modified the parties' custody arrangement, the supreme court did not address the primary-residence issue in that case. *Id.* at 441-43. Thus, the supreme court did not reject this court's holding regarding that issue. We therefore follow the reasoning of our opinion in *M.J.H.* and consider the apportionment of parenting time under the modified parenting-time schedule, as well as the children's relevant attachments to each parent's place of residence and the impact of the modification on those attachments. *See* 899 N.W.2d at 573.

We have already determined that the modified apportionment of parenting time was not a substantial change. Moreover, the fact that the modification did not change the children's school enrollment is significant. Because the children's school is closer to mother's home, their participation in any school extracurricular activities are necessarily more closely connected to mother's home than father's home. Although it would have been helpful if the district court had made findings regarding other relevant factors, such as whether the modification would impact where the children socialize with peers or worship, mother does not assert that the new parenting-time schedule negatively affects the children in those areas. And the record does not support such an assertion. On this record,

we cannot say that the district court erred by concluding that father's requested parenting-time modification would not change the children's primary residence.

Because the district court correctly concluded that father's requested parenting-time modification would not change the children's primary residence, the district court did not err by applying the best-interests standard when deciding whether to grant father's request.

III.

The district court's decision in this case is governed by Minn. Stat. § 518.175, subd. 5(b), which provides, "If modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence. Consideration of a child's best interest includes a child's changing developmental needs." We review a district court's determination that a modification of parenting time is in a child's best interests for an abuse of discretion. *Suleski*, 855 N.W.2d at 334, 337.

Mother contends that "adoption of the equal parenting time schedule [was] unjustified even if it is not deemed to be a modification of a primary residence or a de facto modification of physical custody." Mother argues that the district court failed to make findings justifying its order, complaining that the "district court summarily referenced seven of the twelve best interest factors" in Minn. Stat. § 518.17, subd. 1(a) (2018), and failed to explain why "the 5-2-2-5 equal parenting time schedule would somehow be beneficial in serving those factors." The thrust of mother's argument is that "there is no support in the record for finding that modifying parenting time to a 5-2-2-5 schedule would serve the children's best interests."

Mother cites Minn. Stat. § 518.17, subd. 1(a), which provides, "In evaluating the best interests of the child for purposes of determining issues of custody and parenting time, the court must consider and evaluate all relevant factors," including 12 listed factors. Mother also cites Minn. Stat. § 518.17, subd. 1(b)(1) (2018), which provides that the "court must make detailed findings on each of the [12 best-interest factors] based on the evidence presented and explain how each factor led to its conclusions and to the determination of custody and parenting time."

Mother states that when modifying parenting time, "[d]istrict courts are not required to make specific findings on every best interest factor in 518.17, subd. 1(a); they are required to consider only the relevant best interest factors." She relies on *Hansen v. Todnem*, which held that "[d]istrict courts are not required to make specific, detailed findings on each of the best-interest factors listed in Minn. Stat. § 518.17, subd. 1(a) (2016), when considering requests to modify parenting time under Minn. Stat. § 518.175, subd. 8 (2016)." 908 N.W.2d 592, 594 (Minn. 2018). Father also mentions *Hansen* in his brief.

In *Hansen*, the supreme court stated, "Minn. Stat. § 518.17 applies to the creation and initial approval of parenting plans, but Minn. Stat. § 518.175 still governs parenting time modifications." *Id.* at 596. At issue was a request for parenting-time modification under Minn. Stat. § 518.175, subd. 8, which provides, "The court may allow additional parenting time to a parent to provide child care while the other parent is working if this arrangement is reasonable and in the best interests of the child, as defined in section 518.17, subdivision 1." *Id.* at 594, 597. The supreme court noted that "unlike Minn. Stat. § 518.17, subd. 1(b)(1), nothing in the text of Minn. Stat. § 518.175, subd. 8, requires the district

court to make specific and detailed findings on the best-interest factors." *Id.* at 598. It then explained:

> [Minn. Stat. § 518.175, subd. 8,] requires that the child-care arrangement be "reasonable and in the best interests of the child, as defined in section 518.17, subdivision 1." That language references only the definition of the best interests of the child, which includes the factors listed in Minn. Stat. § 518.17, subd. 1(a). A reference to the *definition* does not, however, compel *detailed findings* under Minn. Stat. § 518.17, subd. 1(b).

Id. (citation omitted). The supreme court clarified that, when considering a modification request under Minn. Stat. § 518.175, subd. 8, a district court is "required to *consider* only the *relevant* best-interest factors in section 518.17, subdivision 1," and is "not required to make specific and detailed findings on those factors." *Id.* at 599.

Unlike the modification statute at issue in *Hansen*, the relevant modification statute in this case, Minn. Stat. § 518.175, subd. 5(b), does not explicitly reference Minn. Stat. § 518.17, subd. 1 (2018). Moreover, in *Hansen*, the Minnesota Supreme Court said that this court's reliance on Minn. Stat. § 518.175, subd. 5 (2016), was "misplaced" in that case because "[a]lthough subdivision 5 does govern parenting time modification requests, subdivision 8 is specific to requests for 'additional parenting time . . . to provide child care while the other parent is working.'" *Id.* at 597 (quoting Minn. Stat. § 518.175, subd. 8).

While some caselaw could be read to assume that *Hansen*'s analysis under subdivision 8 applies to motions made under subdivision 5, the parties do not cite, and research has not revealed, any precedent requiring that motions to modify parenting time

under Minn. Stat. § 518.175, subd. 5, be subject to the same rationale that *Hansen* used in analyzing a motion to modify parenting time made under Minn. Stat. § 518.175, subd. 8.

Nor are we comfortable simply assuming that *Hansen* does in fact apply here. *Hansen*'s analysis is based on Minn. Stat. § 518.175, subd. 8, and the specific language of that provision. Neither that subdivision nor similar language is involved here. Further, in light of *Hansen*'s rejection of this court's reliance on Minn. Stat. § 518.175, subd. 5, to address a motion to modify parenting time properly subject to Minn. Stat. § 518.175, subd. 8, we are reluctant, without more, to simply import *Hansen*'s analysis under Minn. Stat. § 518.175, subd. 8, into this case involving a motion under Minn. Stat. § 518.175, subd. 5. We therefore leave for another day the issue of *Hansen*'s potential application to a modification proceeding under Minn. Stat. § 518.175, subd. 5 (2018). *See In re Civil Commitment of Kropp*, 895 N.W.2d 647, 653 (Minn. App. 2017) ("Minnesota appellate courts decline to reach an issue in the absence of adequate briefing."), *review denied* (Minn. June 20, 2017).

Nevertheless, even *Hansen* is clear that "[t]he district court must make sufficient findings to enable appellate review." 908 N.W.2d at 597 n.2. To be sufficient, those findings must allow an appellate court to assess whether the district court appropriately exercised its discretion. *See Rosenfeld v. Rosenfeld*, 249 N.W.2d 168, 171 (Minn. 1976) (noting, on appeal of a custody award, that findings of fact explaining a district court's exercise of its discretion are necessary to "(1) assure consideration of the statutory factors by the [district] court; (2) facilitate appellate review of the [district] court's custody decision; and (3) satisfy the parties that this important decision was carefully and fairly

considered by the [district] court"); *In re Welfare of Child of J.R.R.*, ___ N.W.2d___, ___ 2020 WL 1845256, at *6 (Minn. App. Apr. 13, 2020) (citing this aspect of *Rosenfeld*). Although more fulsome best-interests findings would have been helpful here, the district court adequately explained its parenting-time decision.

The district court's best-interests findings are as follows:

> Based upon the totality of the evidence as well as the observation by the Court of the parties, and *having considered the parenting time evaluation and the findings of the evaluator, the Court finds that the evaluator's recommended parenting time schedule is in the best interests of the children and will order it below.*
>
> In particular, the order below supports the children's needs, Minn. Stat. § 518.17, subd. 1(1); is consistent with the history and nature of each parent's participation in providing care for the children, Minn. Stat. § 518.17, subd. 1(6); should further the willingness and ability of each parent to provide ongoing care for the children, Minn. Stat. § 518.17, subd. 1(7); should maintain the ongoing relationships between the children and each parent, Minn. Stat. § 518.17, subd. 1(9); should benefit the children in maximizing parenting time with both parents, Minn. Stat. § 518.17, subd. 1(10); should improve the disposition of each parent to support the children's relationships with the other parent, Minn. Stat. § 518.17, subd. 1(11); and should further the willingness and ability of parents to cooperate in the rearing of their children; to maximize sharing information and minimize exposure of the children to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the children, Minn. Stat. § 518.17, subd. 1(12). Other factors are neutral or inapplicable.

(Emphasis added.)

It is apparent that the district court heavily relied on the parenting-time evaluation. We defer to the district court's credibility determinations, including its decision to rely on

an expert's evaluation. *See Kremer v. Kremer*, 827 N.W.2d 454, 463 (Minn. App. 2013) (stating that it "was within the district court's discretion to rely on [a] custody evaluator's testimony and report" and deferring to the district court's credibility determination regarding that evidence), *review denied* (Minn. Apr. 16, 2013). We note that the district court considered both the parenting-time evaluation and an independent rebuttal report that mother submitted. The district court rejected that rebuttal report, explaining that although the report "pointed out issues that could have been addressed," the author of the rebuttal report "did not identify a fatal deficiency in the parenting time evaluation."

It is also apparent that the district court reasoned that it was in the children's best interests to maintain their relationships with each parent and to maximize their time with each parent. Lastly, it is apparent that the district court reasoned that it was in the children's best interests to adopt a parenting-time schedule that would reduce the opportunity for contact, and therefore conflict, between the parents.

The parenting-time evaluation supports the district court's reasoning. The parenting-time evaluator reported that father's home is "clean and spacious and allows many open areas for the [children] to run and play," that during the evaluator's home visit there were "examples of spontaneous affection between [father] and the [children] that appeared quite warm and genuine," and that "it was clear" that the children "enjoy their time with their father." The parenting-time evaluator reported that "[s]chool records suggest the children are doing quite well, both academically and socially, and there does not appear to be evidence that the children do better during stays at one home versus the other." The parenting-time evaluator noted that the children's principal reported that "she

has witnessed the children excited to see both parents," that the children seem happy, and that, "in her estimation, both parents appear to attempt to shield the children from their conflict."

The parenting-time evaluator also described several benefits of a 5-2-2-5 weekly schedule, including that it would be predictable and thereby "help to reduce the confusion and uncertainty which seems to be causing [M.T.G.] anxiety-related stress," that it would provide "a more accurate picture of each parent's respective contributions towards their children's needs while allowing the children to go a maximum of only five days without seeing a parent," and that it would allow "nearly all transitions to occur at the school, minimizing face-to-face exchanges and allowing a parallel parenting approach." The parenting-time evaluator acknowledged that there were potential drawbacks to a 5-2-2-5 parenting-time schedule and that such a schedule was unlikely to resolve the conflict between the parties. But the parenting-time evaluator concluded that "on balance, and by a narrow margin," a 5-2-2-5 schedule was "the best solution for [the] family."

Again, the district court has "broad discretion" in determining parenting-time issues. *Dahl*, 765 N.W.2d at 123. Having reviewed the record in detail and considered mother's arguments, we are not persuaded that the district court abused its broad discretion here.

Affirmed.